IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NOS. 32 & 33 OF 2014

TAX APPEAL NO. 32 OF 2014

The Commissioner of Income Tax
Karnataka (Central), Bangalore .... Appellant

V e r s u s

Sadiq Sheikh
major in age,
FR5, 4th Floor, Souza Towers,
Opp. Municipal Garden,
Panaji - Goa.
PAN : AMFPS2073J .... Respondent

AND

TAX APPEAL NO. 33 OF 2014

The Commissioner of Income Tax
Karnataka (Central), Bangalore .... Appellant

V e r s u s

Sadia Sheikh
major in age,
FR5, 4th Floor, Souza Towers,
Opp. Municipal Garden,
Panaji - Goa.
PAN : AKQPS9076A .... Respondent

Ms. Asha Desai, Advocate for the appellant.

Mr. A. N. S. Nadkarni, Senior Advocate with Mr. Nikhil D. Pai, Advocate for the respondent.

Coram:- F. M. REIS &
C. V. BHADANG, JJ.

Date:- 2nd December, 2015

ORAL ORDER (Per F. M. Reis, J)

The above appeals challenge an order dated 27.09.2013 passed by the Income Tax Appellate Tribunal, Panaji whereby the appeals preferred by respondent are partly allowed.

2. Briefly, the facts of the case as stated by the appellant are that a search under Section 132 was conducted on 25.02.2010 in the residential premises of the Assessee situated near Don Bosco, Odxel, Dona Paula Goa. The Assessee thereafter filed return of income originally on 31.12.2008 declaring the income of Rs.17,34,275/- before the Income Tax Department at Chennai.

3. The case was centralised by order dated 16.06.2010 passed by the Commissioner of Income Tax, Chennai. Accordingly, a notice under Section 153A of the Income Tax Act dated 20.01.2011 was issued and served on the respondent on 25.01.2011 calling for the return of income for the above Assessment Year. Thereafter, as the respondent did not file the return of income in response to the notice issued under Section 153A, reminders were sent and ultimately, the respondent filed a return of income on 02.08.2011 by declaring a total

income of Rs.1,63,10,100/- and agricultural income of Rs.30,000/-. Further notices were issued under Section 142(1) and 143(2) of the Income Tax Act on 03.08.2011. The Assessee was governed by the provisions of Section 5A of the Income Tax Act. Accordingly, 50% of the income was brought to tax in the hands of the respondent herein and the remaining 50% in the hands of his spouse who is respondent in the other appeal. The assessment was completed on 29.12.2011 inter-alia holding that the sale of 18 flats to M/s. Audi constructions Private Limited is a colourable device adopted by the respondent for settling dues of Mr. Monserrate and that the entire gains arising from the transaction of assignment of rights amounting to Rs.14,05,63,839/- has to be brought to tax in the Assessment Year 2008-2009. It was further held that the assignment of rights over the built up area by the respondent to M/s. Salgaonkar Mining Industries amounting to profit on sale of right to the tune of Rs.2,98,05,000/- and the transaction with Mr. Armando Gonsalves was added back as unexplained investment.

4. Being aggrieved by the said order of the Assessment Officer, the respondent preferred an appeal before the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) by order dated 02.08.2013 held with reference to the sale of 18 flats to M/s Audi Constructions, that the order of the Assessing Officer that the transaction with M/s. Audi Construction has taken place on 23.03.2008 and as such, the income from the sale of that flats has rightly been

charged to tax in the Assessment Year 2008-2009. As far as the assignment of rights over the built up area to M/s. Salgaonkar Mining Industries, the CIT (A) upheld the order of the Assessing Officer. With reference to the transactions with Mr. Armando Gonsalves, the assessment order was upheld. The assessment of capital gains on sale of land as per agreement dated 05.10.2002, the Commissioner of Income Tax (A) has held that the particulars of income under capital gain has not been correctly declared and that the transfer of land has not been correctly claimed. Being aggrieved by the said order of the Commissioner of Income Tax (A), the Assessee filed an appeal before the Income Tax Appellate Tribunal, Panaji, which was partly allowed by order dated 27.09.2013. Being aggrieved by the said order, the appellant has preferred the present appeals.

5. During the course of the hearing of the above appeals, both the learned counsel have pointed out that in respect of the same transaction, this Court had disposed of Tax Appeal Nos. 15 and 16 of 2014 by order dated 09.04.2014 whereby the appeals preferred by the appellant came to be dismissed. It is also not disputed that the facts in the present appeals and in the said appeals as well as the parties are the same.

6. On perusal of the impugned order passed by the Income Tax Appellate Tribunal, we find that the learned Tribunal has come to

the conclusion at para 5.3.2 that it is not the case where one can say that the transaction entered into by the Assessee was not shown or that the Assessee wanted to conceal the same. It is further observed that under these facts, the question arises whether any transfer has taken place during the Assessment Year. The learned Tribunal thereafter examined the definition of the word "transfer" in terms of Section 2(47) of the Income Tax Act. The learned Tribunal further found that reading the said Section when an agreement of sale has been executed, as the flats were yet to be constructed, it cannot be said that there is sale, exchange or relinquishment of the asset. It is further held that from the agreement, it is apparent that the respondent has not extinguished his right but has discharged his obligation under the agreement to sell and, therefore, sub-clause (i) to Section 2(47) was not clearly applicable during the subject Assessment Year, so that it can be said that the transfer has taken place during such year. The learned Tribunal further noted that it is an undisputed fact in the case that the Assessee has not delivered the possession of the flats to M/s Audi Construction Pvt. Ltd., even though the Assessee has received the advance and has executed the agreement to sell. Since the possession has not been delivered, the provisions of Section 53A of the Transfer of Property Act, will not apply and therefore clause no.(v) of Section 2(47) will not apply during the subject Assessment Year. It is further observed that mere execution of the agreement by the respondent when the possession has not been delivered, it cannot be said that the transfer in relation to 18 flats has taken place. The learned Tribunal as such deleted the addition made by the Assessing Officer in respect of capital gains amounting to Rs.14,05,63,839/- in the hands of both the respondents. The learned Tribunal has come to the conclusion that the CIT (A) has illegally invoked its jurisdiction enhancing the sale consideration received by the respondent. It was further observed that it is not the case of the appellant that the agreements entered into by the Assessee with M/s. Landscape Developer were not genuine agreements and were bogus. The learned Tribunal as such set aside the order of the CIT (A) and deleted the enhancement made therein. As far as the other claim in respect of payment to Mr. Armando Gonsalves, the learned Tribunal has directed the Assessing Officer to re-decide this issue in accordance with the findings in the Assessment Year 2007-2008. The learned Tribunal also accepted the findings of the CIT (A) in respect of the commission being paid to Mr. Tahir Isani.

7. From the foregoing findings of the learned Tribunal, we find that the learned Tribunal on the basis of appreciation of evidence on record and considering the agreements between the parties has come to the conclusion that there was no 'transfer' and as such the income could not be assessed in the hands of the respondents herein. The records referred to by the learned Tribunal also reveal that the person to whom the flats have been assigned have duly been taxed on such

income which aspect has not been disputed by the learned counsel appearing for the appellant. In this connection, this Court in the judgment reported in **2003(2) Bom. C. R. 449** in the case of **Chaturbhuj Dwarkadas Kapadia V/s Commissioner of Income Tax, Bombay City-VIII** has observed at para 6 thus :

> "**6**. At the outset, we may point out that in this case, the assessee does not deny transfer. The only dispute in this case is whether the transfer took place during the Accounting Year ending 31st March, 1996 or whether it took place during the Accounting Year ending 31st March, 1999. In other words, the dispute is confined to the year of chargeability.
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> Under Section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act would come within the ambit of Section 2(47)(v). That, in order to attract Section 53A, the following conditions need to be fulfilled. There should be a contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly, the transferee should be ready and willing to perform his part of the contract.

That even arrangements confirming privileges of ownership without transfer of title could fall under Section 2(47)(v). Section 2(47)(v) was introduced in the Act from Assessment Year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. Consequently, the assessees used to enter into agreements for developing properties with the builders and under the arrangement with the builders, they used to confer privileges of ownership without executing conveyance and to plug that loop hole, Section 2(47)(v) came to be introduced in the Act.

It was argued on behalf of the assessee that there was no effective transfer till grant of irrevocable licence. In this connection, judgments of the Supreme Court were cited on behalf of the assessee, but all those judgments were prior to introduction of the concept of deemed transfer under Section 2(47)(v). In this matter, the agreement in question is a Development Agreement. Such Development Agreements do not constitute transfer in general law. They are spread over a period of time. They contemplate various stages. The Bombay High Court in various judgments has taken the view in several matters that the object of entering into a Development Agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats at a profit. That the aim of these professional contractors was only to make profits by completing the building and, therefore, no interest in the land stands created in their favour under such agreements. That such agreements are only a mode of remunerating the builder for his services of constructing the building (see Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society [2000] 3 Mah LJ 131). It is precisely for this reason that the Legislature has introduced Section 2(47)(v) read with Section 45 which indicates that capital gains is taxable in the year in which such transactions are entered into even if the transfer of immovable property is not effective or complete under the general law. In this case that test has not been applied by the department. No reason has been given why that test has not been applied, particularly when the agreement in question, read as a whole, shows that it is a Development Agreement. There is a difference between the contract on one hand and performance on the other hand. In this case, the Tribunal as well as the department have come to the conclusion that the transfer took place during the Accounting Year ending 31st

March, 1996 as substantial payments were effected during that year and substantial permissions were obtained. In such cases of Development Agreements, one cannot go by substantial performance of a contract. In such cases, the year of chargeability is the year in which the contract is executed. This is in view of Section 2(47)(v) of the Act.

Before us, it was argued on behalf of the assessee that the date on which possession is parted with by the transferor is the date which should be taken into account for determining the relevant Accounting Year in which the liability accrues. It was argued on behalf of the assessee that in this case, irrevocable licence was given in terms of the contract only during the Financial Year ending 31st March, 1999, and, therefore, there was no transfer during the Financial Year ending 31st March, 1996. On the other hand, it was argued on behalf of the Revenue that one has to go by the date on which the developer substantially performed the contract. It was argued on behalf of the Department that since substantial payments were made during the Financial Year ending 31st March, 1996, and since majority of permissions were obtained during that year, the liability to pay capital gains tax accrued during the Assessment Year 1996-97. In this case, the agreement is a Development

Agreement and in our view, the test to be applied to decide the year of chargeability is the year in which the transaction was entered into. We have taken this view for the reason that the Development Agreement does not transfer the interest in the property to the developer in general law and, therefore, Section 2(47)(v) has been enacted and in such cases, even entering into such a contract could amount to transfer from the date of the agreement itself. We have taken this view for a precise reason. Firstly, we find in numerous matters where the Assessing Officer and the Department generally proceed on the basis of substantial compliance of the contract. For example, in this very case, the Department has contended that because of substantial compliance of the contract during the Financial Year ending 31st March, 1996, the transfer is deemed to have taken place in that year. Such interpretation would result in anomaly because what is substantial compliance would differ from officer to officer. Therefore, if on a bare reading of a contract in its entirety, an Assessing Officer comes to the conclusion that in the guise of the agreement for sale, a Development Agreement is contemplated, under which the developer applies for permissions from various authorities, either under Power of Attorney or otherwise and in the name of the assessee, then the Assessing Officer is entitled to take the date of the contract as the date of transfer in view of Section 2(47)(v). In this very case, the date on which the developer obtained a commencement certificate is not within the Accounting Year ending 31st March, 1996. At the same time, if one reads the contract as a whole, it is clear that a dichotomy is contemplated between limited power of attorney authorising the developer to deal with the property vide para 8 and an irrevocable licence to enter upon the property after the developer obtains the requisite approvals of various authorities. In fact, the limited power of attorney may not be actually given, but once under Clause 8 of the agreement a limited power of attorney is intended to be given to the developer to deal with the property, then we are of the view that the date of the contract, viz., 18th August, 1994, would be the relevant date to decide the date of transfer under Section 2(47)(v) and, in which event, the question of substantial performance of the contract thereafter does not arise. This point has not been considered by any of the authorities below. No judgment has been shown to us on this point. Therefore, although there is a concurrent finding of fact in this case, we have enunciated the principles for

> applicability of Section 2(47)(v). We do not find merit in the argument of the assessee that the Court should go only by the date of actual possession and that in this particular case, the Court should go by the date on which irrevocable licence was given. If the contract, read as a whole, indicates passing of or transferring of complete control over the property in favour of the developer, then the date of the contract would be relevant to decide the year of chargeability."

8. In the present appeals, taking note of the said observations and the findings of the fact arrived at by the learned Tribunal on the basis of the agreements executed by the Assessee, that there was no transfer of possession in terms of the provisions of Section 2(47) of the Income Tax Act, in the subject year we find that the findings of the learned Tribunal deleting the capital gains of Rs.14,05,63,839/- cannot be faulted. The findings of the fact arrived at by the learned Tribunal on that count cannot be re-appreciated by this Court. The learned counsel appearing for the appellant has not shown any perversity in such findings and/or there was any misreading of evidence on record. Admittedly, in the present cases, there was no irrevocable licence nor the respondents were given complete control of the subject premises in the Assessment Year 2008-2009 by the respondent. As pointed out herein above, the learned counsel appearing for the respective parties have not disputed that in the similar situation the Tax Appeal Nos. 15

and 16 of 2014 have been dismissed. The learned counsel appearing for the appellant has pointed out that there was no challenge to the said judgment passed by this Court.

9. On perusal of the proposed substantial questions of law, we find that the learned Tribunal was justified in holding that the income from the sale of 18 flats to M/s Audi Constructions Pvt. Ltd., is not assessable in the year 2008-2009 as on the basis of the facts on record, the learned Tribunal found that the respondent-assessee had not delivered the possession of the flats to M/s Audi Constructions Pvt. Ltd. in the subject year. The learned Tribunal also found that it is not the case of the appellant that the agreements executed by the respondent-assessee are bogus or fictitious upon appreciating the evidence on record and as such, there is no substantial question of law which can arise in the above appeals as this Court in the present appeals cannot reappreciate the evidence on record. The learned Tribunal also refused the contention of the appellant upon appreciating the evidence on record to come to the conclusion that the provisions of Section 2(47) of the Income Tax Act have not been satisfied. In such circumstances, the substantial questions of law proposed by the appellant as such would require reappreciation of evidence which exercise cannot be done in the above appeals under Section 260A of the Income Tax Act as the learned counsel appearing for the appellant as pointed out herein above has failed to show that there is any

perversity in such findings or that any material evidence has been discarded or that the learned Tribunal has come to such conclusion by misreading the evidence on record.

10. For the aforesaid reasons, we find that the substantial questions of law proposed by the appellant do not arise in the present appeals. Consequently, both the appeals stand dismissed.

C. V. BHADANG, J **F. M. REIS, J**

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